FILED
MAR 23 1945
CHARLES ELMORE CROPLEY
CLERK

No. 885

Supreme Court of the United States

OCTOBER TERM, 1944

A. M. ANDERSON, Receiver of the National Bank of Kentucky of Louisville,

Petitioner,

v.

R. C. TWAY,

Respondent.

REPLY BRIEF

ROBERT S. MARX,
FRANK E. WOOD,
HARRY KASFIR,
Counsel for Petitioner.

NICHOLS, WOOD, MARX and GINTER,
Of Counsel.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

No. 885

Supreme Court of the United States

OCTOBER TERM, 1944

A. M. ANDERSON, Receiver of the National Bank of Kentucky of Louisville,

Petitioner,

v.

R. C. TWAY,

Respondent.

REPLY BRIEF

The response of Tway to the petition amounts to a confession that the "questions presented" are correctly stated in the petition. The response is an attempt to excuse the departure by the courts below from the accepted and usual course of judicial proceedings and to justify the denial of "due process" and cross-examination. The response admits that there was no sworn evidence of the alleged fraud —admits that no witness took the stand with respect thereto—admits that the unverified papers on which the "proof" of fraud rests contained much second-hand, hearsay and incompetent evidence—admits that the right of cross-examination was denied the plaintiff—admits that Tway falsely swore that he owned the stock, whereas the Coal Sales Company was "the real owner of the stock" (see

his Response Brief, pp. 6, 37)—admits that the alleged sale of Banco stock by the bank was ultra vires. Nor does the response deny that the case at bar is a test or class case upon which many similar cases depend.

No excuse is offered for the departure from the accepted course of judicial proceedings and the denial of Constitutional rights in the court below, except that the Receiver, in two previous cases, had introduced in evidence and relied upon, the bank examiners' reports. The two cases referred to were (1) the suit by the Receiver against the bank directors to recover damages for their alleged negligence and violation of statutory duties,[1] and (2) the suit of the Receiver against the shareholders of BancoKentucky to recover their proportionate liability for assessment on the bank stock held by Banco.[2]

In both of these cases, the Receiver offered in evidence the bank examiners' reports. However, in both of these cases, the reports were offered in evidence in accordance with the accepted and usual course of judicial proceedings and the Constitutional rights of the defendants in both of these cases were fully protected. In both of these cases, the trial court required that the bank examiners who prepared the report be sworn, placed upon the witness stand and examined as to his sources of information and also that he submit to cross-examination. In the suit to establish directors' liability, the examiners personally appeared and the record shows lengthy examination and cross-examination.[3] Likewise in the suit to establish stockhold-

---

[1] *Atherton* v. *Anderson*, 86 F. (2d) 518; 302 U. S. 643; 99 F. (2d) 883.

[2] *Anderson* v. *Abbott*, 321 U. S. 349.

[3] In the transcript of record, Vol. II, Narrative Bill of Evidence, Vol. I, No. 12, Oct. Term, 1937, Supreme Court of the United States, Examiner Vance L. Sailor testified under direct examination, p. 483; under cross-examination, p. 485. Robert Neill testified under direct examination, p. 487; cross-examination, p. 499; re-examination, p. 507; recross-examination, p. 508; recalled in rebuttal, p. 510. Examiner John S. Wood, direct examination, p. 514; cross-examination, p. 524; re-examination, p. 552. Examiner Stewart H. Mann testified direct examination, p. 553.

ers' liability, the trial court refused to admit the bank examiners' reports until the bank examiners were each sworn as witnesses and testified concerning their reports. Thus fact was separated from hearsay and direct evidence from second-hand and incompetent information, which the examiners could not "guarantee."[4]

Both the directors' and the stockholders' liability cases were equity proceedings tried before a judge, without a jury. The present case was an action at law tried before a jury who were not capable of separating the wheat from the chaff, and who were instructed by the court that they could predicate their verdict upon the hearsay and second-hand information contained in the examiners' reports.

Tway based his principal claim of alleged fraud on the assertion (which covers 23 pages of his answer) that Banco was formed for the specific purpose of removing bad assets from the bank and taking them into the portfolio of Banco. This evil and fraudulent purpose was stressed in the argument of his counsel to the jury (R. 1387) and was the basis of the jury verdict. Moreover, in both of the cases in which the Receiver introduced the bank examiners' reports the court found affirmatively, and as a result of direct and cross-examination, that Banco was not organized to take bad assets out of the bank and had no such evil and fraudulent purpose. This demonstrates that when the accepted course of judicial procedure is followed, the court could and did disregard incompetent and unsupported hearsay and made findings directly contrary to the verdict of the jury in the present case, which was based solely on hearsay.[5]

---

[4] Record No. 3, Oct. Term, 1943, Supreme Court of the United States, Examiner Robert Neill, direct examination, pp. 140-153; cross-examination, pp. 153-159; recalled for further direct examination, pp. 159-166; recross-examination, p. 166. Examiner Russell Mooney, p. 167. Examiner John S. Wood, direct examination, pp. 169-182; cross-examination, p. 182.

[5] In the directors' liability case, *Atherton* v. *Anderson*, 86 F. (2d) 518, 537, the court said: "The BancoKentucky Company was certainly not a

Counsel for Tway recognized in the Court of Appeals that the trial court's departure from the constitutional safeguards of due process could not be defended and, therefore, endeavored in that court to withdraw any reliance upon the alleged sinister and fraudulent purpose of Banco. We quote from the Court of Appeals' opinion in the present case:

> "Tway now contends that he did not rely upon the allegation that Banco was organized for the purpose of removing bad assets from the bank. That issue was, however, submitted to the jury and there can be no doubt that the evidence bearing thereon was prejudicial." (R. 1365.)[6]

In this court he has again reversed his position and reverts to the claim made in the lower court. (See his Response to Petition, p. 54.)[7] Hence questions 1 and 2 set forth in the petition for certiorari are squarely presented

---

sham . . . nor was it organized for a fraudulent purpose or to conceal secret or sinister enterprise conducted for the benefit of the bank."

In the stockholders' suit, *Anderson* v. *Abbott*, the court found "Banco was organized in good faith. Banco was 'certainly not a sham.' Banco was 'not organized for a fraudulent purpose or to conceal secret or sinister enterprise conducted for the benefit of the bank.' Banco 'was formed for the purpose set out in the letter of July 19, 1929, and for no other purpose.'" (R. No. 3, October Term, 1943, Volume 1, p. 267.)

In connection with the finding of fact that Banco was formed for the purpose set out in the letter of July 19, 1929, and for no other purpose, compare Tway's answer, where he says that that letter "does not set forth, but was in truth and fact the reason why the bank organized that company." (R. 16.) ". . . The BancoKentucky Company was organized by the bank for the purpose of procuring this defendant and others to subscribe for stock of the BancoKentucky Company and to pay for same in cash in order that the bank, being in control of said BancoKentucky Company, might take the funds of the BancoKentucky Company for worthless claims carried by the bank amongst its assets." (R. 21.)

[6] When that issue was submitted to the jury, the District Judge instructed them that the only evidence tending to establish this claim was the observation in the bank examiners' reports. (R. 1217.)

[7] "Now in the case at bar it was alleged in paragraph 2 of the answer (R. 21) that among the purposes which the bank had in mind in the organization of Banco was to have the newly-organized company use its assets for taking sour assets, which had been criticized by the Comptroller and the national bank examiners, out of the National Bank of Kentucky, and the answer pleaded that this fact, as well as other material facts, were not disclosed to Tway at the time the bank sold the Banco stock to him. *It is apparent, therefore, that this allegation was a material one in the case at bar.*"

and the excuse that the Receiver relied upon bank examiners' reports in two previous cases after the Examiner was sworn and duly examined, shows no inconsistency in the position of Receiver but proves the necessity for following constitutional safeguards and requiring both sworn evidence and cross-examination.

In the response brief, Tway quotes from the brief the Receiver filed in the stockholders' suit, where references were made to the examiners' reports. (Response brief, pp. 12-16.) Consideration of the passages quoted will show that such references were made to establish the condition of the bank. The Receiver has consistently claimed that the bank's financial condition was shown in the examiners' reports. This is a far different question from the one here presented, which is an attempt to use the examiners' reports, without calling the examiners, to show that Banco was organized for a secret and fraudulent purpose. The condition of the bank was taken from the books of the bank, which were the subject of examination. The statement in the report, from which the deduction was drawn that the purpose of Banco was to remove "sour" and "bad" assets from the bank, was pure hearsay from an unidentified source and comes clearly within the boundaries of the preliminary statement of the examiner, that he was "not in a position to guarantee the accuracy of such part of the information."

RECENT DECISION OF TENTH CIRCUIT COURT OF APPEALS SUPPORTS OUR POSITION ON QUESTIONS 1 AND 2, AND IS IN CONFLICT WITH THE DECISION OF THE PRESENT CASE

Since filing petition for a writ of certiorari in the above case the decision and opinion of the Tenth Circuit Court of Appeals in *Franklin et al.* v. *Skelly Oil Company,* 141 F. (2d) 568, March 10, 1944, has come to our attention.

This decision is in direct conflict with the decision in the present case on questions one and two set forth in our petition for writ of certiorari.

Franklin v. *Skelly Oil Company,* supra, was a damage suit for negligence. The court excluded an *official "report by a public officer acting in pursuance of his statutory duty."* Appellant contended this was error. The Court of Appeals held that the report should have been excluded. In so holding the court said:

> "*But expressions of opinion and conclusions on causes and effects based upon factual findings are not always admissible as public records, especially when it is shown either that the conclusion or opinion which the statement purports to convey would not be admissible in evidence if tendered by the direct testimony of the maker, or if the denial of the right of cross-examination would result in the perversion of the rule of trustworthiness and reliability.* See *Kansas City Life Ins. Co.* v. *Meador,* 186 Okl. 397, 98 P. (2d) 20. The search is for truth and the trial court is the first and best judge of whether tendered evidence meets that standard of trustworthiness and reliability which will entitle it to stand as evidence of an issuable fact, absent the test of cross-examination.
>
> "Here the written statement of the inspector was offered for the purpose of proving the primary issue of negligence in a private lawsuit, and upon its face it stated the bare opinion of the officer who made it. By its peculiar character and the circumstances under which it was offered, the trial court was justified in the exercise of his discretion not to admit it ex parte. The statement is not admissible because of its lack of authenticity or because it is not a public document subject to public inspection, but because the matter and things contained therein express merely the opinion of one whose official office and duty does not rise to the dignity of an adjudicator of causes and effects."

In the case at bar the trial court admitted hearsay statements contained in examiner's reports, the accuracy of which the examiner affirmatively stated could not be guaranteed since they were not obtained at first hand. The answer to the question on pages 29-30 of the Response Brief is that such statements would not be admissible in evidence if made during the course of direct testimony had the examiner been called to the witness stand. The Tenth Circuit holds that such hearsay statements contained in official reports should not be admitted and that their admission would result in a "*denial of a right of cross-examination*" and "*in the perversion of the rule of trutworthiness and reliability.*" As this court said in *Alford* v. *United States,* 282 U. S. 687, 691:

> "In this respect a summary denial of the right of cross-examination *is distinguishable from the erroneous admission of harmless testimony.*"

We submit that the important question of the introduction of hearsay in official reports without calling the official responsible therefor as a witness, without cross-examination and without verification, and the conflict of decision thereon should be resolved by this court.

ADMISSION OF UNVERIFIED BILL

The "response" seeks to minimize the gravity of admitting the unverified bill in equity of the Receiver against the directors. The entire bill in equity was introduced in evidence by Tway and his counsel read to the jury the portions thereof making certain *claims* with respect to the organization of BancoKentucky. These claims were largely held to be incorrect upon the subsequent trial of the case. Nevertheless, these disproved *claims* made in an unverified bill went to the jury as *uncontradictable proof of facts.*

The attempt of the Receiver to show that the claims had been disproved by offering the final opinions and findings in the directors' liability case was denied (R. 1095, 1172). The attempt in the "response" to justify this departure from "due process" has no substance. The cases cited to justify the admission of unverified claims are state cases contrary to the Federal authorities and to the rule in Kentucky. The Kentucky cases and the three Federal cases mentioned on pages 33 and 34 are not cases which involved introduction of unverified pleadings. The Receiver by presenting *claims*, did not make "admissions." The Receiver had no personal knowledge of the facts. The court decided that the claims made were not established. It would be strange, indeed, if the claims of the bill in equity against the directors on which the Receiver was not able to recover after an elaborate trial, should now become unimpeachable proof of unproved charges. Respondent has no answer to the statement of Judge Simons in the opinion below, to wit:

> "Since the opinion in *Atherton* v. *Anderson*, supra, was an adjudication that there was no fraudulent intent in the organization of Banco, the Receiver should have been permitted, by means of it, to demonstrate the error in the allegations of his pleading." (R. 1364.)

The question is not merely as to the erroneous admission and exclusion of evidence. When the court held that the claims in the bill of equity were not rebuttable, the Receiver was denied the opportunity to produce his proof. This constitutes a denial of "due process."

CONCLUSION

Tway was a party-defendant in *Anderson* v. *Abbott*, in which his assessment liability was determined. In that case, he was successful in having the courts hold "that Banco was organized in good faith,"—"that it was not organized for a fraudulent purpose or to conceal enterprises conducted for the benefit of the bank." This court accepted those findings "as they were concurred in by two courts and no clear error is shown." In the present case, in an effort to avoid liability on his note, he successfully induced a jury to hold diametrically opposite on the basis of *unverified hearsay* in examiners' reports and *unsworn claims* in a bill in equity, which were judicially disproved. The findings of the court in the *Abbott* case in which Tway was a party-defendant and an appellee in this court, should have been accepted by the courts below as a final determination of the issue and binding upon him in all subsequent trials of the same issue. *Southern Pacific R. R.* v. *U. S.*, 168 U. S. 1; *Oklahoma* v. *Texas*, 256 U. S. 70.

The questions presented in this case and which will necessarily arise in each of the cases against other borrowers from the bank which are awaiting trial pending the final decision of this case, are of general importance. Similar questions are arising and will continue to arise in connection with the use of official reports as conclusive proof of hearsay statements contained therein. The importance of the questions is not denied by respondent.

Respectfully submitted,

ROBERT S. MARX,
FRANK E. WOOD,
HARRY KASFIR,
Counsel for Petitioner.

NICHOLS, WOOD, MARX and GINTER,
Of Counsel.